

A.F.R.
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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.6 of 2000

Appellant : **Ashok Kumar,**
aged about 27 years, S/o Shri
Bhagwat Satnami, R/o Village
Murkuta, P.S. Navagarh, District
Durg

Versus

Respondent : **The State of Madhya Pradesh,**
Through Station House Officer, P.S.
Navagarh, District Durg

Mr. R.K.Jain, counsel for the appellant.

Mr. M.P.S.Bhatia, Panel Lawyer for the respondent/ State.

J U D G M E N T

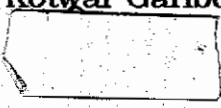
(Delivered on 08th November, 2005)

Per Vijay Kumar Shrivastava, J.

This appeal has been directed against the judgment of conviction and order of sentence passed by Additional Sessions Judge, Bemetara in Sessions Trial No.161/2000 on 29-9-2000, whereby the appellant Ashok Kumar has been convicted for committing offence punishable under Sections 450 and 376(2) of the Indian Penal Code and has been sentenced to undergo rigorous

imprisonment for 2 years and fine of Rs.200/-, in default of payment of fine, to undergo further rigorous imprisonment for 1 month, and rigorous imprisonment for 10 years and fine of Rs.500/-, in default of payment of fine, to undergo further rigorous imprisonment for 2 months respectively with a direction to run both the substantive sentences concurrently.

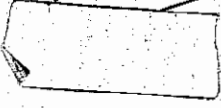
2. Material facts for disposal of this appeal are that, on 1-12-99, when victim, aged about 10 years, was alone in her house, the appellant entered her house and forcibly committed sexual intercourse with her. At that time, her brother Shashikant alias Sushil came from school and saw the incident. The appellant, seeing that Shashikant alias Sushil has come, left the victim and fled away from the spot. Shashikant alias Sushil went to the field and narrated the story to Rambai. Rambai came to her house. She examined the internal part of the victim who is her daughter. She also saw that semen was lying on the ground and one slipper was also left by the appellant. She took her daughter to Police Station Navagarh and reported the incident to the Police. First Information Report was registered and the matter was investigated by the Police. During the investigation, skirt and underwear of the victim were seized from her mother Rambai. Plain earth, earth stained with semen and one slipper were recovered and seized from the spot. One slipper was seized from the appellant. To prove the age of the victim, Kotwari Register i.e. Birth and Death Register was recovered and seized from the Kotwar Garibdas.



3. The appellant and the victim were sent for medical examination. Dr. P.K.Bajpai examined the appellant Ashok Kumar. Dr. Smt. S.Rai examined the victim. After examination, she also prepared slides from vaginal smear of the victim and sent the slides to the Police for chemical examination. For confirmation of age, ossification test was conducted by Dr. A.K.Sahu. Witnesses were examined under Section 161 of the Code of Criminal Procedure. Soil recovered from the spot, underwear and skirt belonging to the victim, one underwear belonging to the appellant and slides prepared by medical officer from the vaginal smear of the victim, collected by the Police during the investigation were sent to Forensic Science Laboratory, Raipur for examination. On examination, except on the earth, no semen or spermatozoa was found on other articles. After completion of the investigation, charge-sheet was led in the Court of Judicial Magistrate First Class, Bemetara, who committed the case to sessions for trial.

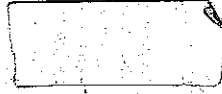
4. Charges under Sections 450 and 376(2) of the Indian Penal Code were framed against the appellant, read over and explained to him, who abjured the guilt. During the trial, his defence was that he is innocent and because of inimical relation he has been falsely implicated in the case.

5. The victim is a deaf, dumb and blind. This fact has not been challenged by the appellant as also her age has also not been subject matter of challenge during the arguments. From the evidence of Rambai, P.W.-1, the mother of the victim, Shashikant alias Sushil, P.W.-2, her brother, and Gendlal, P.W.-3, her father, it is established that the victim is deaf, dumb and blind. All these



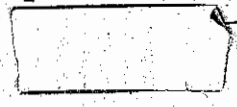
witnesses have also given evidence to support the age of the victim to be around 10 years. The Kotwar Garibdas, P.W.-7 has proved seizure of Birth and Death Register showing the entry regarding birth of the victim, and according to that Register, the date of birth is 1-10-1989. It means, on the date of incident, according to the Birth and Death Register, the victim was of the age between 10 to 11 years. Dr. A.K.Sahu, on the basis of ossification test, has deposed in his evidence that, the age of the girl was around 10 years. Therefore, from all these evidence, it was established that, on the date of incident, her age was around 10 years.

6. Learned counsel for the appellant contended that there is no evidence to support penetration or sexual intercourse by the appellant with the victim as required under Section 375 of the Indian Penal Code. He further contended that the victim has neither been examined during the investigation nor has been examined in the Court. The only evidence relied on by the Court is the evidence of Shashikant alias Sushil, P.W.-2, who, although in the Court has stated that he saw the appellant committing rape on the victim yet in his statement before the Police he did not tell the said story, therefore, there being material omission in his statement recorded under Section 161 of the Code of Criminal Procedure, his statement made before the Court regarding rape neither can be believed nor can be accepted to be true. Other witnesses have not witnessed the incident. Learned counsel for the appellant further contended that, to support intercourse or rape, medical evidence is negative and the report of chemical examiner also does not support the fact of intercourse. On the other hand, learned counsel for the



State contended that although the victim being deaf, dumb and blind could not be examined by the Police and by the Court yet in the soil recovered and seized from the spot semen has been found, and witness Shashikant alias Sushil, P.W.-2 although in his statement under Section 161 of the Code of Criminal Procedure did not disclose the fact that he witnessed the incident of rape yet in the Court supported the story of rape on oath, therefore, learned Court below correctly held the appellant guilty for committing the offence of rape and house-trespass.

7. From the impugned judgment it is apparent that, the victim has not been examined by the Police during the investigation and the Court also did not examine her as she was deaf, dumb and blind and was unable to give evidence. Therefore, the evidence of the victim is not available to support the intercourse. The only witness Shashikant alias Sushil, P.W.-2 is said to be an eye witness who witnessed the incident. Shashikant alias Sushil, P.W.-2, in his statement, has deposed that, when he came from school and entered his house, he saw the appellant committing rape on his sister, and the appellant, seeing him, fled away. His statement before the Police is Ex.D-1. In Ex.D-1, he did not state that he saw the appellant committing rape on his sister, but he simply stated that when he entered his house, he saw the appellant jumping from the wall and his sister was lying on the ground. If the witness had seen the appellant committing rape, he should have stated the same before the Police, therefore, having such material contradiction, how far his statement before the Court can be accepted to be true that he saw the appellant committing rape on his sister. Learned trial



Court also, in its judgment, has held that an important omission is there in the Police statement.

8. Dr. P.K.Bajpai, P.W.-6, who examined the appellant, has deposed in his statement that, on examination, he found no external injury on the body of the appellant and also no injury was found on his thigh or perennial region. Dr. Smt. S.Rai, P.W.-14 has examined the victim. She deposed that, no injury was found on her body, thigh or on her perennial region. She also deposed that, on internal examination, she found the vagina healthy and no injury was found inside it. Slight bleeding was there. She was of the opinion that, it was because of the monthly period i.e. menstruation.

9. Ex.P-18 is the report of chemical examiner. Chemical examiner did not find semen or spermatozoa on the slide prepared by Dr. Smt. S.Rai, P.W.-14 from the vaginal smear of the victim and also on her clothes i.e. underwear and skirt. Even on the underwear of the appellant, semen or spermatozoa was not present. The other evidence collected were the evidence of mother, father and others, who came to know about the incident from others.

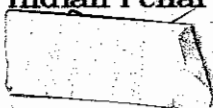
10. To support intercourse or penetration, the evidence of the victim is not available and other evidence i.e. medical evidence and report of chemical examiner also do not support the same and the evidence of Shashikant alias Sushil, P.W.-2 on material point is contradictory. On discrepancies, the law is settled now, normal discrepancies in evidence are those which are due to normal errors



of observation, normal error of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and these are always there. Material discrepancies are those which are not normal and not expected of a normal person. While normal discrepancies do not corrode the credibility of a witness, material discrepancies do so, hence the evidence of Shashikant alias Sushil, P.W.-2 cannot be relied on for recording that the appellant committed rape on the victim.

11. There is no reliable evidence to establish that intercourse or penetration on the victim has been committed by the appellant or anybody, therefore, holding the appellant guilty for committing rape on the victim is without reliable evidence, hence, the finding of the Court below, holding the appellant guilty for committing the offence of rape, is erroneous and liable to be set aside.

12. The appellant was found inside the house of Rambai, P.W.-1, who, on arrival of Shashikant alias Sushil, P.W.-2, fled away therefrom by jumping the wall, is established from the evidence of Shashikant alias Sushil, P.W.-2, but the appellant entered the house for committing the offence of rape, has not been proved, therefore, so far house-trespass is concerned, the appellant is guilty for it and deserves to be punished under Section 448 of the Indian Penal Code, but cannot be held guilty for committing the offence punishable under Section 450 of the Indian Penal Code.



13. In the result, the appeal is partly allowed. Conviction and sentence passed by the trial Court under Sections 450 and 376(2) of the Indian Penal Code are set aside. Instead, the appellant is held guilty for committing the offence punishable under Section 448 of the Indian Penal Code and is sentenced to undergo rigorous imprisonment for 1 year, and to pay a fine of Rs.200/-, and in default of payment of fine, to undergo additional rigorous imprisonment for 1 month.

Sd/-
V.K.Shrivastava
Judge

08-11-2005

G.Singh